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appear to sustain their validity where they are a source of title. Whether this was to be done or was done, by general rule, or by special orders in each case, is a question upon which we need not enter, as there is in this case no allegation or proof of either.

The conclusion at which I have arrived on this point, renders it unnecessary to examine the other questions in the case.

In the Supreme Court of Pennsylvania.

SUNBURY AND ERIE RAILROAD COMPANY VS. LEWIS COOPER.¹

1. Specific performance is not a proper form of remedy for refusal to carry out a contract for the purchase of bonds of an Improvement Corporation; there being ordinarily an adequate remedy by the common law action for damages. But those courts that have original jurisdiction of the cause of action, and authority to follow both equity and common law forms, may give redress in such a case in the equity form, if there be no demurrer to the form.
2. Specific performance of a contract to purchase bonds of the Delaware Division Canal Company, is not within the original jurisdiction of the Supreme Court in banc; but at Nisi Prius they have original jurisdiction of such a breach of contract, and may give redress in the equity form, if there be no demurrer to the form.
3. The legislative pledges of the public faith, and of the public works and their income, as security for the money borrowed to construct the works, is not a contract that can be enforced by the judiciary of the State.
4. No court has authority to entertain a question that involves a charge of fraud in the legislature, as a means of setting aside a public law passed by it.
5. A party who has obtained the passage of a private Act of Assembly by bribery, imposition or other fraudulent means, would, perhaps, not be entitled to any benefit from it, if the fraud be shown.
6. No court has authority to entertain a charge of dishonest motives against the legislature as a means of showing that any act of legislation is unconstitutional.
7. The legislature has authority to sell the public works constructed by the State, and the courts have no authority to declare the sale void for inadequacy of price, or for any undue favor to local interests supposed to have influenced the sale.
8. The Act of Assembly, of 21st April, 1858, authorizing the sale of the State Canals, is not unconstitutional.

This case was argued at Sunbury on the 6th of October last, before Chief Justice Lowrie and Judges Strong, Thompson and

¹ We are indebted to the Pittsburg "Legal Journal" for this case.—*Eds. Am. Law Reg.*

Porter. Judge Woodward did not sit in the case, being a stockholder in the Sunbury and Erie Railroad Company. On the part of complainants, the argument was conducted by Charles Gibbons and Hon. John C. Knox, Attorney-general of Pennsylvania, and on behalf of respondents, by Wm. L. Hirst and Hon. J. S. Black, U. S. Attorney-general.

The important points raised, are all fully set forth in the opinion.

The opinion of the court was delivered at Pittsburgh, November 5, 1858, by

LOWRIE, CH. J.—The plaintiff is possessed of a large amount of bonds issued by the Delaware Division Canal Company, and has contracted to sell one hundred thousand dollars of them to the defendant; but he refuses to perform his contract, and the plaintiff has brought this bill in equity, to compel him to perform it.

We know of no law giving the Supreme Court in banc original jurisdiction over such a cause of action as this, and we must not assume it. This is not a proper case for this equitable form of remedy, for we can see no reason why the damages that are recoverable in the common law form, are not an adequate redress for the breach of contract: and if it were otherwise, this cause, being instituted at Philadelphia, is required by law to pass through the *Nisi Prius* before it can properly come in banc.

Though we do not regard the case as a proper one for the application of this equitable form of remedy, yet the *Nisi Prius* has jurisdiction of the *cause of action*, and it may give redress in the equity form, if the defendant does not demur to the form, even though the common law form is the more appropriate one. *Brightly's Equity*, § 24. The court in banc has original jurisdiction of some classes of cases, if brought in the equity form, and not if brought in the common law form, and there the form is an essential element of the jurisdiction; but it is not so in the inferior courts which have original jurisdiction of the cause of action irrespective of the form.

We are, therefore, of opinion that this cause may be tried and decided in *Nisi Prius*; and as we heard it fully argued in banc

before adverting to the foregoing considerations, and as it is a case of great and pressing importance, it will be decided there by the judge of the court who shall next hold that one, on his opinion drawn up with the concurrence of the three judges who heard the argument, and will be subject to appeal to a full bench. If the parties desire to be heard again, the case may be argued on appeal with more direct reference to the views now to be expressed, and with the aid of the experience derived from the argument already had.

The case comes up on bill and answer, and, therefore, there is no dispute about the evidence.

The plaintiff became the purchaser, under the act of 21st of April 1858, of certain canals belonging to the State, and sold a part of them to the Delaware Division Canal Company, and in consideration thereof, received the bonds, which it afterwards contracted to sell to the defendant, and which he refuses to take and pay for. Has he a sufficient excuse for this refusal?

The defendant founds his refusal on the allegation that the plaintiff had no valid title to the canal sold to the Delaware Division Canal Company, and that, therefore, the bonds in question given by them on their purchase, are liable to a defence for failure of consideration; and this allegation is attempted to be sustained by various arguments, which we now proceed to consider.

1. It is urged that, when the State was contracting her public debt in constructing her canals, she pledged their income for the payment of the principal and interest thereof, and that she cannot, in good faith to her creditors, part with that income for any other purpose.

This objection assumes that this sale is an improper one, and is really a diversion of the pledge, and we may, for the present, allow it the advantage of this assumption. It assumes, moreover, that this court has some sort of authority, directly or indirectly, to enforce the pledge; and this we are not prepared to admit.

How the objection might be answered, as a question of morals, we are not to discuss; for we can exercise no authority on that ground in this case. If this court has no legal or constitutional

authority to enforce the pledge, we have none to declare that it has been violated; and most certainly no such authority has been proved to us, and we know of none. The State also pledged its *faith* and *credit* for the same purpose; and it would not be pretended that we have authority to enjoin the Legislature to respect this part of the pledge by providing adequate taxation. For such a pledge, as well as for the one insisted on, the remedy is a moral one, to be enforced by means of the moral sense of the community operating upon the Legislature, and by means of the moral sense of the civilized world operating upon both the people and the Legislature—an influence and responsibility to which all States are subject.

2. It is objected that the act of the 21st. April, 1858, is a palpable fraud upon the people of the State and that, therefore, this sale, made under it, and depending upon it, is voidable.

In support of this objection, the following facts are relied on:—

That works, producing a net revenue which represents a principal of over nine millions of dollars, are sold for three and a half millions:

That they are sold to a railroad corporation that has proved itself totally unable, for want of capital, to build even the half of its own road:

That, though part of the consideration is, for awhile, to be secured on the works sold; yet, in the end, this security is to be withdrawn, and a mortgage of seven millions, on a still unfinished railroad, is to be substituted; one-half of which is for the security of the State, and the other half for the security of persons from whom the Company may hereafter borrow money, at any rate of discount, to complete their road; and thus even the consideration money is risked upon the chances of a finished and successful road, and by sharing with subsequent creditors the benefit of the mortgage security, when it might have been abundantly and very naturally secured by a mortgage on the works sold:

That the canals are sold to the plaintiff, not to be retained and managed, but to be resold at advanced prices, to the profit of the

plaintiff, and in such a form as to allow the plaintiff to have the ability to pledge them as security for money to be borrowed :

That these and other facts show that the act of Assembly, instead of being what it professes to be—a simple sale of the public works—is fraudulently intended as an act in aid of the Sunbury and Erie Railroad Company :

That its passage was secured by improper influences brought to bear on the members of the Legislature ; the interests of the State having been sacrificed to local interests on the line of the road ; to the interests of Philadelphia, which is a large stockholder ; to the interests along the line of the Allegheny Valley Railroad, which is to be aided by a subscription of half a million of dollars ; and to the interests along the North Branch, by reason of a preference that is given to the inhabitants there, in the resale of the North Branch division.

Certainly, these facts present a case that justifies an argument in support of the proposition, that the act of assembly was not passed for the mere purpose of selling the public works, but mainly in aid of the Sunbury and Erie Railroad Company ; that its passage was secured by the influence of private, or, at least, local interests, to the prejudice of the interests of the State ; and they furnish elements for the argument that it is a fraud upon the people. But is this the proper tribunal to try such a question ? May the judiciary sit in judgment upon a charge that the Legislature have been faithless to their oaths, to the constitution, and to the public interests, by passing a law that is a fraud upon the State ? This question was not discussed, and yet, unless it can receive an affirmative answer, all the argument on this branch of the subject must be regarded as out of place.

We cannot hesitate a moment on this question. We have no such authority, and ought not to have. However far the Legislature may depart from the right line of constitutional morality, we have no authority to supervise and correct their acts on the mere ground of fraudulent or dishonest motives. We know of no such check upon legislation, and would not desire to see such a one instituted. The remedy for such an evil is in the hands of the people

alone, to be worked out by an increased care to elect representatives that are honest and capable. If the judiciary have such authority, then every justice of the peace is competent to sit in judgment upon every act of legislation which disorderly moralists or knavish or ignorant anarchists may choose to charge as fraudulent. Nay, more, if the question may be raised in a judicial proceeding, the judges and justices of the peace will be *bound* to investigate and decide it; and the principal judicial business might then become that of testing, not cases by the standard of the law, but the standard itself, by the infinitely various and uncertain judicial notions of morality.

And notice, the principal element of fraud charged here is, that members gave undue prominence to local interests; that is, that they regarded too much the wishes and interests of their constituents. In order to condemn this, there must be some rule of law declaring that undue devotion to the interests of constituents is a fraud upon the State; and there must, besides, be judges possessed of supreme indifference to such interests, and capable of precisely defining what, for each case, is undue devotion. It is very easy to see that a power having such control over legislative motives would be destructive of all free legislation, and seriously obstructive of social development.

We do not say that a party, who has obtained the passage of a private act of assembly by bribery, imposition, or other fraudulent means, can claim any benefit from it, if the fraud be shown; perhaps this would be treated in the same manner as a judgment in court, as a title from the land office obtained by fraud.

But here is no pretence of fraudulent practices by the purchaser of the canals.

The legislature, on its own motion, and for its own reasons, tendered the bargain on certain terms, and these terms were accepted. The motives of the Legislature in so doing, cannot be inquired into by the courts.

3. It is further objected that the act of assembly is unconstitutional, and therefore no valid title to the canals can be made under it.

The argument in support of this objection is founded on the same facts that were insisted on, as evidence of *fraud*, in support of the objection which we have just considered.

Now, it is urged that these facts prove that the act of assembly is not, in truth, for the sale of the canals, but in aid of the Sunbury and Erie Railroad Company, by means that are forbidden by the constitution; that a sale of the canals at less than half their value, to a railroad company without means, and with a road projected which it cannot possibly finish without aid; a sale made with the expressed intention that the canals shall be re-sold at a profit to the railroad company, and under an arrangement by which the price is to be secured on the railroad alone, and by which the prospective debts of the company are to be of equal LIEN with the price to be paid to the State; a sale effected, not by public biddings, where competition is invited, but by an act of assembly fixing all the terms, and carried by the influence of local interests, some of which are illegitimately and unnaturally brought into connection with the scheme of the act; it is insisted that this is no sale at all, but a gift, or mainly a gift, of the canal to the railroad company, and is forbidden by the constitutional amendments of 1857, which dedicate the income or proceeds of the sale of the public works to the sinking fund for the payment of the public debt.

Here again, and under a different aspect, the sincerity and honesty of the Legislature, in the performance of their duties, is attempted to be made a question of judicial cognizance; and again we say that we have no jurisdiction of such a question, and can have no right to express any official opinion in relation to it. Official morality in us requires that we shall not assume authority to judge of the official morality of the Legislature. For the faithfulness and honesty of their public acts, we repeat, they are responsible to the public alone, and not by means of a trial before the courts.

We must interpret their acts as they intended them to be interpreted. They declare this to be a sale, and we are not to attribute to the Legislature improper motives, in order to construe it a gift. It is a sale in a very ordinary form, by means of a proposal made

and accepted. This might be a better means of sale than it would be to put the canals up at auction to the highest bidder ; for such large sales require large combinations of capital, and these combinations might easily be formed so as to exclude competition. The Legislature, alone, has the authority to select the form of the sale, and if it chooses, the form of proposal and acceptance of terms—it, alone, can make the proposal.

The amendments to the constitution dedicate the proceeds of the sale to the Sinking Fund ; but they, in no particular, limit the legislative authority to sell. In this matter it is the supreme authority in the State ; its act is the act of the State by its legitimate organ ; in that act it had a discretion, to exercise which, the Courts cannot, without usurpation, review or criticise. Every owner of property may sell it at as low a price as he pleases ; may favor whom he pleases in the bargain ; may regard other than mere financial interests ; and the people may do the same with their property ; and the Legislature, acting for them, are the judges of what the people themselves would do. The courts cannot investigate the justice of their judgment. This may be a sale for a very inadequate price, and on very inadequate security ; but certainly it is a sale and not a gift. It may have been induced by motives that sacrifice the public interests of the people to mere local ones ; but these motives cannot, in their nature, be the subject of judicial cognizance.

It does not legally vitiate a contract that there are other motives for it in the minds of the parties besides the consideration named in it. Almost all contracts have such motives. A man may sell his house or his horse because he does not wish to keep it, or does it under some moral or financial necessity of parting with it, or thinks that it will better suit another to use it, or take care of it, as well as because he is getting a price for it in money or other valuable things. It is still a sale, notwithstanding these private motives, and though the price may be a low one. And a State, as well as an individual, may have motives for a sale, independent of price ; and it is the Legislature that is to ascertain and act upon these motives. This is a part of their duty in every act of legis-

lation. They must express and act upon the motives of the people in every exercise of their legitimate authority. Whether they do it well and faithfully, or not, the people must judge ; for they have instituted no authority to do it for them.

Such an authority is, in fact, impracticable. In the very nature of human institutions, people must trust very largely to the good faith and devotion of their public agents, if they would have a government that is worth anything. They cannot have an efficient government, if they do not allow it a large freedom in its movements. And they cannot have honest and honorable men in office, if they are to be always suspected by the people, because of their office. And if the people choose dishonest men for public positions, no amount of suspicion and no system of checks will be adequate to save them from the evils and costs of a dishonest government.

Legislative motives may be immoral and faithless ; but acts alone can be unconstitutional. Motives belong to our interior morality, and are not naturally subject to legal regulation ; and so far as the State attempts it, all liberty of conscience is endangered. Morality regards action and its motives, while law regards the action alone. Law does not sanction or allow improper motives, but it is incompetent to reach them ; they belong to the forum of conscience. Law has no condemnation for acts that are not unlawful, while morality takes higher ground, and condemns conduct if its motives be bad.

Acts that are not forbidden by the constitution, in form or substance, cannot be constitutionally condemned, because of the motives that induce them. No human conduct could stand such a test, and no human skill could be trusted to apply it. If we should attempt it here, it might well be asked, "Who art thou that judgest another man's servant ? to his own master he standeth or falleth."

Laws and constitutions are designed as means of social order and harmony ; but they would be the very reverse of this, if no act could be justified under them, until its *motives* should be ascertained and approved. Law, the more it undertakes to test conduct by motives, the more it is apt to be disorderly and tyrannical. It does sometimes pass judgment upon malicious and fraudulent

motives, when it finds external acts clearly indicating them, and in such cases especially it is often cruelly oppressive in its conclusions. We cannot thus try legislative acts. To judge of their validity by motives would be impossible, for the prevailing motive in the mind of every member might be different.

It was attempted, in the argument, to test the validity of the act of assembly, by applying to it the somewhat analogous private relation of principal and agent, but the test is inappropriate. A private agent to sell, simply acts out the motives, known or unknown, of his principal; whereas a legislator has generally to seek, in his own experience and observation, for the motives which ought to justify his acts, and to be satisfactory to the public. Moreover, the judicial authority of the State is instituted to judge of the fulfilment of the duties of private relations, and not to decide whether legislatures have faithfully fulfilled theirs; though, as judicial authority, it may protect private rights even against legislative acts, if they are forbidden by the constitution.

In view of what we have now said, it seems to us that the remaining points of the case may be briefly disposed of.

We do not perceive that, by the sale under this act of assembly, the State assumes the debt of any corporation, or lends her credit to any, or becomes a stockholder in, or joint owner with any. The sole foundation of the arguments to establish these points is, that the price and the security are inadequate. But on this subject we are not authorized to supervise or review the discretion and judgment of the Legislature. If we could supervise it, we could direct and control it, and we have not this much authority over the political discretion even of municipal corporations. If the price and security had been adequate, in the judgment of the objectors, they could have found no footing for the argument which they have made. They have not attempted to prove that this court has authority to decide this fundamental question.

The subscription that is required to the Allegheny Valley Railroad, and the preference given on a re-sale to the inhabitants along the North Branch, may have been motives inducing the act, in whole or in part; but they are not part of the legal consideration

of the sale. It may be that some members may have thought that a connection of the Sunbury and Erie with the Allegheny Valley Road, would be a valuable one, and would increase the security of the debt to the State; and that the North Branch Canal would be the best managed for the public good by being owned by the people of the neighborhood. But we are not called upon to ascertain or account for legislative motives, for we could not sit in judgment upon them, even if we knew them. A law that the Legislature may make, we must obey, whatever may have been their motives, even though it be a very unwise one.

The provision, under which the company contracts to pay the State three-fourths of the profits of a re-sale of the canals, does not make the State a joint owner with the company of the canals. She reserves no title in them, in any sense, that could have been meant by the constitution. It is a sale out and out, but with a contract to increase the price in a certain event. The company's share of the profits of re-sale may be unreasonable, but of this the Legislature, alone, could judge in making its proposal of sale.

We are, therefore, of opinion that no valid, legal, or constitutional objection has been suggested against the title granted under the act of assembly, and that none of those which have been made can be maintained either by State creditors, or tax payers, or the Canal Commissioners; and at the next Nisi Prius we shall direct a decree in favor of the plaintiff, according to the prayer of the bill. We declare our opinion now in advance, in order that the parties may have the more time to consider the subject preparatory to a re-argument on appeal to the court in banc, if they shall think an appeal advisable.

In the District Court for the City of Philadelphia.

AGNEW vs. THE INSURANCE COMPANY.

A loss which arises from the efforts made to prevent goods from being destroyed by fire, must be borne by the assurer, and not by the insured, whether the particular injury in question be produced by water used to extinguish the flames, or results from dangers, such as theft, to which the property is exposed in an attempt to remove it to a place of safety.